In the Supreme Court of the United States

October Term, 1977

No. 76-1566

ROGER H. COMLY,
Appellant

v.

TOWNSHIP OF LOWER SOUTHAMPTON,
Appellee

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

MARTIN J. KING
Attorney for Appellant

CORDES, KING & HOFFMANN
27 South State Street
Newtown, Pennsylvania 18940

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Opinion of the Commonwealth Court of Pennsylvania is reported at —— Pa. Commonwealth Ct. ——, 365 A.2d 883, and appears herein as Appendix A. The Opinion of the Court of Common Pleas of Bucks County, Pennsylvania is reported at 28 Bucks Co. L. Rep. 319, and appears herein as Appendix B. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This civil case arises from the dismissal of the appellant, Roger H. Comly, from his position as a police officer of the Township of Lower Southampton, Pennsylvania. Appellant was charged in an administrative proceeding with "conduct unbecoming an officer" in violation of Pennsylvania's Police Tenure Act, Act of June 15, 1951, P.L. 586, §2, as amended, 53 P.S. 812. "Conduct unbecoming an officer" is not defined in the statute; but it has been defined by the courts of the Commonwealth of Pennsylvania. Appellant contended that Section 2, subsection (4) of the Police Tenure Act is invalid because it is repugnant to the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The decision of the Supreme Court of Pennsylvania was in favor of the validity of the statute.

(ii) The judgment or decree sought to be reviewed is the order of the Supreme Court of Pennsylvania denying appellant's petition for allowance of appeal, which was entered *per curiam* on February 11, 1977 and appears herein as Appendix C. Because Pennsylvania Rule of Appellate Procedure 1123(b)(1) requires certification of intervening circumstances in applications for reconsideration, no such application was filed. Notice of appeal was filed in the Supreme Court of Pennsylvania, the Commonwealth Court of Pennsylvania and the Court of Common Pleas of Bucks County, Pennsylvania, on February 24, 1977, one, any or all of which possessed portions of the record. Copies of the notices of appeal appear herein as Appendix D.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257-(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L.Ed. 2d 125, 95 S.Ct. 2268 (1975);

Huffman v. Pursue L.T.D., 420 U.S. 592, 43 L.Ed. 2d 482, 95 S.Ct. 1200 (1975);

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 43 L.Ed. 2d 328, 95 S.Ct. 1029 (1975).

Cohen v. California, 403 U.S. 15, 29 L.Ed. 2d 284, 91 S.Ct. 1780 (1971);

Giaccio v. Pennsylvania, 382 U.S. 399, 15 L.Ed. 2d 447, 86 S.Ct. 518 (1966);

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928);

Gregory v. McVeigh, 23 Wall. 294, 90 U.S. 156 (1875).

(v) The validity of the Police Tenure Act, Act of June 15, 1951, P.L. 586, §2, as amended (53 P.S. 812), is here involved. The text of that section is as follows:

§812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act,[1] with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

The full text of the statute is set out verbatim as Appendix E.

[1] 1951, June 15, P.L. 586, §2; 1961, June 14, P.L. 348; §1; 1965, July 19, P.L. 219, §1.

QUESTION PRESENTED BY THE APPEAL

Section 812, subsection (4) of the Pennsylvania Police Tenure Act provides that a police officer may be disciplined for "conduct unbecoming an officer". The statute contains no definition of this phrase. The Pennsylvania courts have defined it as follows:

> Any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services . . . [is conduct unbecoming an officer].
>
> *Eppolito v. Bristol Borough*, 19 Commonwealth Ct. 99, 339 A.2d 653, 655 (1975);
>
> and
>
> [Conduct unbecoming an officer is] . . . that which adversely affects the morale or efficiency of the bureau to which one . . . is assigned.
>
> *In re Baker*, 409 Pa. 143, 146, 185 A.2d 521 (1962).

The statute also proscribes conduct constituting a felony or misdemeanor, but does not prohibit conduct constituting a summary offense as defined by state law. Appellant's conduct was a summary offense.

The following question is presented by this appeal:

Whether a state statute that proscribes conduct constituting a felony or misdemeanor, but not con-

duct constituting a summary offense, and which penalizes as "conduct unbecoming an officer" any act "tending to destroy public respect" or "adversely affecting police morale", gives fair warning, as required by the Fifth and Fourteenth Amendments, that conduct which is performed off-duty, out of uniform, not related to the performance of official duty and not involving honesty or moral turpitude, but which constitutes a summary offense, is punishable by the deprivation of property rights, without proof of even the putative results sought to be prevented by the statute?

STATEMENT OF THE CASE

Roger H. Comly, appellant herein, is a citizen of the United States and a resident of Bucks County, Pennsylvania. At all times relevant hereto, appellant was a tenured police officer employed by appellee, Township of Lower Southampton, Bucks County, Pennsylvania.

On November 19, 1975, appellant was dismissed as a police officer by the Chief of Police of appellee Township for "conduct unbecoming an officer". Pursuant to Section 815 of the Police Tenure Act, appellant petitioned the Court of Common Pleas of Bucks County for reinstatement. Appellant's petition raised the question, *inter alia*, whether Section 812 of the statute is unconstitutional under the First, Fifth and Fourteenth Amendments (R. 74a) [2] The Court of Common Pleas summarily dismissed appellant's argument:

> Appellant has challenged the standard of "conduct unbecoming an officer" as being unconstitutional for vagueness under the due process provisions of the United States Constitution. [3] Appellant

[2] "R" references are to the reproduced record filed by the appellant in the Commonwealth Court of Pennsylvania, which has been certified and transmitted to this Court.

[3] Contemporaneous with the filing of this appeal, the appellant has filed a petition for writ of certiorari raising a facial attack upon the statute under the First Amendment overbreadth doctrine. Appellant questioned the facial constitutionality of the act in the courts below.

> makes this contention in the face of *Faust v. Police Civil Service Commission of Borough of State College* [22] Commonwealth Ct. [123], 347 A.2d 765 (1975), which he acknowledges and which holds to the contrary but based upon argument that this case is bad law and should not be followed. Obviously, that is an argument which may not be dignified in this Court, it being an opinion by an appellate court of this Commonwealth which is binding on this court. (R. 114a)

An appeal of the lower court's opinion and order was filed in the Commonwealth Court of Pennsylvania, again specifically raising whether the statute's proscription of "conduct unbecoming an officer" is unconstitutional under the First, Fifth and Fourteenth Amendments to the Constitution of the United States (A.B. 2, 24-29, 34-42).[4] The Commonwealth Court affirmed "on the opinion of Judge Garb written for the Court of Common Pleas . . ." (Appendix A.) From the opinion and order of the Commonwealth Court of Pennsylvania, appellant filed petition for allowance of appeal in the Supreme Court of Pennsylvania, again raising the constitutional question. This petition was denied *per curiam mem.* on February 11, 1977. Because Pennsylvania Rule of Civil Procedure 1123(b)(1) requires that applications for reconsideration must be based upon "intervening circumstances", which do not exist in this case, no application for reconsideration was filed.

[4] A.B. references are to the appellant's brief filed in the Commonwealth Court of Pennsylvania, which has been certified and transmitted as part of the record to this Court.

The grounds upon which appellant was dismissed for "conduct unbecoming an officer" related to his commission of a game law violation while off-duty, out of uniform and outside of his township, on November 9, 1975. This game law violation is a summary offense under Pennsylvania law.[5]

Because Section 812, subsection (3) of the Police Tenure Act provides that no tenured police officer shall be suspended, removed or reduced in rank except for the "violating of any law which provides that such violation constitutes a misdemeanor or felony", the appellee proceeded under subsection (4) of the Act, which proscribes "conduct unbecoming an officer".

In rejecting appellant's contentions that the act and its state court explications are vague and deny appellant due process under the Fifth and Fourteenth Amendments, the state courts applied to appellant's prejudice a state appellate court precedent which holds that the statute need not give notice that the conduct is proscribed, but that actual warning by a policeman's superior is sufficient to meet Fifth Amendment mandates: *Faust v. Police Civil Service Commission of Borough of State College.* 22 Com-

[5] Summary cases in Pennsylvania are those in which the issuing authority or district justice exercises original jurisdiction. Pennsylvania Rule of Criminal Procedure 3(p). Enforcement of game violations in Pennsylvania is by summary proceedings. *See and compare*, Act of June 3, 1937, P.L. 1224, art. XII, §1202; 1949, April 18, P.L. 494, §1; 1949, April 18, P.L. 509, §1; 1957, May 17, P.L. 144, §1; 1959, Sept. 11, P.L. 879, §1 (34 P.S. §1311.-1202), *as suspended and superseded by and with* Pa. R. Crim. P. 29.

monwealth Ct. 123, 347 A.2d 765 (Pa. 1975), *allocatur refused mem.*

This state court precedent directly conflicts with the holdings of this Court, which consistently and clearly hold that *statutory* notice is required.[6] It was noted further in all state courts that appellant received neither statutory notice nor actual warning that his conduct was proscribed under the Police Tenure Act. On the contrary, his superior knew of prior similar conduct and had assured appellant that his conduct would not affect his employment (R. 19a, 55a).

The Commonwealth Court of Pennsylvania by its opinion and order, as well as the Supreme Court of Pennsylvania by its *per curiam* order denying allocatur, approved and affirmed this construction. The affirmations overruled the contention, which appellant raised by petition to the first court of record and at all subsequent stages, that the application of the above definition of "conduct unbecoming an officer" is repugnant to the Fifth Amendment, as applied to state statutes through the Fourteenth Amendment, insofar as it has deprived appellant of an important property right, without due process of law.

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[6] A litigant's actual notice will effect standing to raise a First Amendment attack on a statute's overbreadth. *Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed. 2d 439, 458, 94 S.Ct. 2547 (1974).

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

I.

Because the courts of Pennsylvania have misconstrued applicable decisions of this Court regarding the Fifth Amendment vagueness doctrine, and have not applied decisions of various federal courts construing the vagueness of police tenure statutes which proscribe "conduct unbecoming an officer", this case presents an important constitutional question affecting the rights and liberties of many American citizens. This court on numerous occasions has invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendment because they contained no standard whatever by which proscribed conduct could be ascertained; the doctrine of these cases has subsequently been described as being one of "void for vagueness". *Parker v. Levy*, 417 U.S. 733, 755, 41 L.Ed. 2d 439, 457, 94 S.Ct. 2547 (1974);[7] B. Schwartz, *A Commentary on the Constitution of the United States*, Part III, Vol. 1, at 88 (1968).

This constitutional requirement of definiteness is violated by a statute that fails to give a person of ordinary

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[7] In *Parker*, this Court upheld the standard of "conduct unbecoming an officer" as used in the Manual for Courts-Martial, because of limiting examples of its application described therein, as well as "the factors differentiating military society from civilian society", 417 U.S. 756. The Pennsylvania statute contains no limiting examples as in *Parker v. Levy, supra; see also Bence v. Breier*, 501 F.2d 1185, 1192 (7th Cir. 1974).

intelligence fair notice that his contemplated conduct is forbidden. *Parker v. Levy, supra; Broadrick v. Oklahoma,* 413 U.S. 601, 607, 37 L.Ed. 2d 830, 837, 93 S.Ct. 2908 (1973); *Bouie v. Columbia,* 378 U.S. 347, 351, 12 L.Ed. 2d 894, 898, 84 S.Ct. 1697 (1964); *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 83 L.Ed. 888, 890, 59 S.Ct. 665 (1948); *Connolly v. General Construction Co.,* 269 U.S. 385, 391, 70 L.Ed. 322, 46 S.Ct. 126, 127 (1926). Whenever a statute is vague in the sense that it prescribes no standard of conduct, as opposed to an imprecise but comprehensible normative standard, it is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. *Parker v. Levy, supra; Bouie v. Columbia, supra; Lanzetta v. New Jersey, supra.*

That the statute subject to challenge on grounds of vagueness is civil rather than penal in nature is of no moment. *Giacco v. Pennsylvania,* 382 U.S. 399, 402, 15 L.Ed. 447, 450, 86 S.Ct. 518 (1966). Where an employee can only be challenged for cause,[8] he has a property interest which is entitled to constitutional protection. *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed. 2d 15, 94 S.Ct. 1633 (1974); *Olshock v. Skokie,* 541 F.2d 1254, 1256, 1257 (7th Cir. 1976); *Bence v. Breier,* 501 F.2d 1185, 1188 (7th Cir. 1974).

This Court consistently has condemned statutes wherein there arises doubt whether an actual or putative result is meant. *See, e.g., Smith v. Goguen,* 415 U.S. 566, 39 L.Ed. 2d 605, 94 S.Ct. 1242 (1974); *Lanzetta v. New Jersey* at U.S. 458. The Pennsylvania definition of "con-

[8] The Police Tenure Act only applies to police officers who are tenured and therefore can be dismissed only for cause, of which class appellant is a member. *See* Appendix E, *infra.*

duct unbecoming an officer" is any act or omission which tends to destroy public confidence in the municipal services or which adversely affects the morale and efficiency of the department. *Faust v. Police Civil Service Commission, supra,* at A.2d 765, 768, 769.[9] The fatal error of the court's explication is that it condemns no act or omission. 306 U.S. 458, 83 L.Ed. 893. Rather, the statute is couched in terms of standardless interpretations to be made by others after the act or omission, irrespective of whether such conduct is legal, illegal, moral, immoral, performance related or unrelated, on duty or off, rumored or actual. Whether a police officer who traverses a stop sign,[10] for example, is guilty of "conduct unbecoming an officer", thereby rendering the officer subject to dismissal, depends upon the future unfettered discretion and sensibilities of decision makers. Neither the statute nor the state courts' narrowing interpretations give notice of what is prohibited; rather, they leave this determination to future revelation, which process is repugnant to the constitution. *See Bouie v. Columbia, supra,* at U.S. 352, 353, 12 L.Ed. 2d 889, 890. Any punishment so imposed must of consequence be cruel and unjust. 1 *W. Blackstone, Commentaries,** 46.

The Police Tenure Act manifests all of the markings of a constitutionally vague statute: it gives no notice of

[9] In *Faust,* the Commonwealth Court of Pennsylvania ruled that rumors in the community of Faust's immorality was sufficient to override his right to privacy because such rumors had the proscribed "tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *Id. allocatur refused mem.*

[10] Passing through a stop sign is a summary offense in Pennsylvania. Like appellant's conduct it is an offense *mala prohibita* connoting no moral offensiveness or depravity of itself.

what is prohibited; it delegates resolution of basic policy to an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 33 L.Ed. 2d 222, 92 S.Ct. 2294, 2298 (1972). It accordingly poses *prima facie* a substantial and important constitutional question which should be briefed and argued, in the instant context, and decided by this Court.

II.

That a substantial federal question is presented cannot be doubted in light of *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), which, in examining a strikingly similar Wisconsin rule, opined the vagueness of the Pennsylvania Police Tenure Act. The Seventh Circuit Court of Appeals rejected the defendant's contention that reference to police tenure acts of other states supported their position:

> We similarly find no guidance in comprehending the conduct proscribed in the rule from examining cases from other jurisdictions cited by the defendants. For example, the Pennsylvania Supreme Court in the case of *In re Zever's Appeal*[sic], 398 Pa. 35, 156 A.2d 821 (1959), found "Unbecoming conduct on the part of a municipal employee, especially a policeman . . . is any conduct which adversely affects the morale or efficiency of the bureau to which he is assigned. . . . Unbecoming conduct is also any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Clearly, this definition is vague, as the proscribed conduct is phrased in such generalities as to leave the policeman bereft of any ascertainable standard with which to guide his conduct.
>
> 501 F.2d at 1193, *cert. den.*

In *Bence*, the Court of Appeals accordingly held the Wisconsin proscription of "conduct unbecoming a member and detrimental to the service" to be violative of the due process clauses of the Fifth and Fourteenth Amendments. *Id.* at 1190.

The recent surge of similar cases throughout the courts, federal and state, accentuates the important and ripe federal question presented. *See, e.g., Herzbrun v. Milwaukee County*, 504 F.2d 1189 (7th Cir. 1974); *Clark v. Weeks*, 414 F. Supp. 703 (N.D. Ill. 1976); *Crawford v. Short*, 387 F. Supp. 282 (S.D. Texas 1975); *Tygrett v. Washington*, 346 F. Supp. 1247 (Dist. Ct. D.C. 1972); *Zekas v. Baldwin*, 334 F. Supp. 1158 (E.D. Wisc. 1971); *Flynn v. Giarusso*, 321 F. Supp. 1295 (E.D. La. 1971); *Hamtramck Civil Service Commission v. Pitlock*, 44 Mich. App. 410, 205 N.W. 2d 293 (1973); *Sponick v. City of Detroit Police Department*, 49 Mich. App. 162, 211 N.W. 2d 674 (1973). It evidences a national quandary concerning the proper relationship between the state and its police officers as well as subsisting deprivation of property rights under police tenure statutes. While some statutes have withstood constitutional challenge, because the case law has narrowed their application to conduct having a direct relation to and connection with the performance of official duties [*see, e.g., Clark v. Weeks, supra*], the Pennsylvania statute is not similarly delimited. The lower courts have deprived appellant of property without due

process of law by their resistance to constitutional directive. The pendent violation of the rights of other unknown officers, under similar statutes, without notice of what conduct is proscribed thereunder, promises questions of equal importance throughout many jurisdictions. It respectfully is submitted that consideration of the individual liberties at stake supports the importance of this Court's review of the statutes governing police conduct.

III.

It is basic that the sufficiency of the notice that a statute gives must be examined in the light of the conduct with which a party is charged. *Parker v. Levy, supra* at U.S. 757, 41 L.Ed. 2d 458; *see generally Robinson v. United States,* 324 U.S. 282, 89 L.Ed. 944, 54 S.Ct. 666 (1947). The constitutional repugnance of appellant's predicament is exacerbated by consideration of the statutory context vis-a-vis the conduct here involved.

Subsection (3) of the Police Tenure Act specifically proscribes the criminal offenses warranting discharge: violating of any law which provides that such violation constitutes a misdemeanor or felony. Act of June 15, 1951, P.L. 586, §2; 1961, June 14, P.L. 348; §1; July 19, P.L. 219, §1. The legislature, if it gave notice of anything, did not proscribe summary offenses, *expressio unius est exclusio alterius.*[11] The appellant's conduct was a summary game law violation. The conduct was performed off-duty, out of uniform, in another township and was neither job related, nor constituted an act *crimen falsi;* nor did it involve moral turpitude. It is submitted that a statute that prohibits conduct amounting to a felony or misdemeanor, and not summary offenses, but which punishes summary offenses not involving job or performance related conduct, immorality or an act of dishonesty, does not comport with ordinary notions of fair play and settled rules of law. *Lanzetta v. New Jersey, supra* at U.S. 453, 83 L.Ed. 890. It is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[12] *Id.*

Where statutes have punished conduct which is directly related to job performance or otherwise connected to employment functions, they have been held to meet constitutional standards. *Arnett v. Kennedy, supra* (employee falsely accusing superior of official misconduct); *Herzbrun v. Milwaukee County, supra* at 1193. [welfare department employees disrupted communication in welfare office]; *Clark v. Weeks, supra* at 707, 708. However, statutes proscribing "acts or omissions unbecoming an incumbent" are by their terms directed at conduct both on and off duty; these have been held both vague and overbroad under even less rigorous standards of scrutiny. *Zekas v. Baldwin, supra* at 1161, 1162.[13]

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[11] The Courts of Pennsylvania have ruled the maxim applicable to the Police Tenure Act. *Kretzler v. Ohio Township,* 14 Commonwealth Ct. 236, 322 A.2d 157 (1974). There is no question of construction.

[12] It is interesting to note that appellant could not understand the action taken against him, because it was a summary offense (R. 47a); (*see also* R.R. 74b, 75b). RR references are to appellee's "Supplemental Record" filed in the Commonwealth Court of Pennsylvania, which has been certified and transmitted to this Court.

[13] In *Zekas,* it was suggested that off the job conduct should subject the statute to more rigorous standards of constitutional scrutiny. *Id.* at 1161, n.3

In the case at Bar, the punished conduct was unrelated to job performance. It was off-duty conduct, not involving moral turpitude or dishonesty. It was in a class of summary conduct not proscribed by the statute. It is reiterated that the subject statute and case law definitions of "conduct unbecoming an officer" give no hint that such acts are included within their ambit. [14]

Appellant properly stands before this Court seeking redress for the violation of his constitutional rights. It is clear that questions of vagueness are proper questions to be decided by this Court by direct appeal pursuant to 28 U.S.C. §1257(2). *Erzoznick v. City of Jacksonville,* 422 U.S. 205, 45 L.Ed. 2d 125, 95 S.Ct. 2268 (1975); *Giacco v. Pennsylvania, supra.* It is the rule that where the issue was presented to the state courts, a right of appeal exists:

> A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. 28 U.S.C. §1257(2).
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> *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 605, 43 L.Ed. 2d 482, 493, 95 S.Ct. 1200 (1975) (Mr. Justice Rehnquist).

[14] There was no evidence introduced purporting to show that police morale was affected or that the public lost confidence in municipal services. The record is silent on this issue. *See generally Cohen v. California, infra* at U.S. 20, 29 L.Ed. 2d 291.

Where, as here, the highest state court declines to review a lower court opinion, the denial of certiorari or allocatur, as the case may be, constitutes a final decision of the highest state court, subject to review by appeal. *Cohen v. California,* 403 U.S. 15, 18, 29 L.Ed. 2d 284, 289, 91 S.Ct. 1780, *reh. den.* 404 U.S. 876, 30 L.Ed. 2d 124, 92 S.Ct. 26 (1971) (California Supreme Court declined review) *citing Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 66 L.Ed. 239, 42 S.Ct. 106 (1921); *Gregory v. McVeigh,* 23 Wall. 294, 90 U.S. 156, 157 (1875) (rule stated). [15] If the necessary effect of the highest court's judgment is to deny the claim, that is enough; it is not necessary that the ruling be put in direct terms. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 73 L.Ed. 184, 187, 49 S.Ct. 61 (1928).

The instant issue was "drawn in question" before all state courts. Although no particular form of words or phrases is essential to draw the matter in question, *New York ex rel. Bryant v. Zimmerman, supra,* appellant specifically and consistently raised it. *Accord: Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476, 43 L. Ed. 2d 328, 338, 95 S.Ct. 1029 (1975). Not only did appellant assert the repugnance of the statute to the Fifth and Fourteenth Amendments; he urged the state courts to adopt a constitutional construction of it: that "conduct unbecom-

[15] "It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment or affirmance and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this Court." 90 U.S. at 157.

ing an officer" be construed to require that the act or omission in question either must be duty or performance related, or, if unrelated to job performance and performed off-duty and out of uniform, it must constitute a felony, misdemeanor, or involve dishonesty, or moral turpitude, before being proscribed under the statute (A.B. 28).

The Court of Common Pleas summarily dismissed the issue and contention, without reasoned discussion and in reliance upon the maxim *stare decisis*. The Commonwealth Court of Pennsylvania adopted the lower court opinion, without discussion. The Supreme Court of Pennsylvania upheld the validity of the statute by refusing allocatur. *See: Cohen v. California, supra; Gregory v. McVeigh, supra.* The matter is before this Court pursuant to 28 U.S.C. §1257 (2).

Appellant again asserts that the Police Tenure Act of Pennsylvania is violative of the Fifth and Fourteenth Amendments because it is vague. Appellant respectfully submits that a constitutional interpretation requires that the conduct either be job or performance related; or, where conduct unrelated to performance or duty is involved, it must fall within the recognized legal classifications of acts *crimen falsi* or involving moral turpitude.[16] It is noted that on the analogous question of whether a police officer may be disciplined for asserting Fifth Amendment privilege to remain silent in official

[16] This standard is proposed only as to conduct that is not constitutionally protected *per se;* for example if the conduct involves speech, assembly, association or other protected activity, a situation not at bar in this case, a more rigid standard might be required.

investigations, this Court has ruled that dismissal is permissible only where no threat thereof is made in order to coerce waiver, and the questions asked are "specifically, directly and narrowly" related to the performance of official duties. *See, e.g., Gardner v. Broderick,* 392 U.S. 273, 278, 20 L.Ed. 2d 1082, 1086, 88 S.Ct. 1913 (1968); *Uniformed Sanitation Men Association v. Commissioner,* 392 U.S. 280, 284, 20 L.Ed. 2d 1093, 88 S.Ct. 1917 (1968). It is submitted that a construction of the Police Tenure Act embodying similar safeguards against discriminatory and arbitrary deprivation of property rights is essential before it, as well as similar statutes in other jurisdictions, can be construed to provide constitutional notice of what is proscribed by the phrase "conduct unbecoming an officer".

CONCLUSION

It is submitted that appellant's construction of the various authorities constitutes a proper interpretation of minimal requirements for proscribing "conduct unbecoming an officer". The interpretation of the Supreme Court of Pennsylvania fails to give notice to police officers of what conduct is proscribed. It fosters arbitrary and capricious deprivations of constitutionally protected property rights.

Unless relief is granted, appellant will be unconstitutionally deprived of a protected right. The Pennsylvania courts have and shall continue to misapply rulings of this Court; the rights of American police officers and other

governmental employees will be infringed throughout many other jurisdictions.

For these and the other reasons stated, the appeal should be granted and this cause briefed and argued before the Court.

Respectfully submitted,
MARTIN J. KING
Attorney for Appellant

27 South State Street
Newtown, Pennsylvania 18901

CERTIFICATE OF SERVICE

I, Martin J. King, Attorney for Appellant, do hereby certify that three copies of Appellant's Jurisdictional Statement and Appendix were served by United States mail, postage prepaid, first class, on April 28, 1977 addressed to Marcel Groen, Esquire, Groen, VonRosensteil, Smolow & Burkett, Neshaminy Plaza II, Suite 105, Street Road and Bristol Pike, Cornwells Heights, PA 19020. I further certify that all parties required to be served in this appeal have been served.

Martin J. King

MARTIN J. KING
Attorney for Appellant

APPENDIX A

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

COMLY v. LOWER SOUTHAMPTON TOWNSHIP
[Cite as Pa. Cmwlth., 365 A.2d 833]

Roger H. Comly, Appellant,

v.

Lower Southampton Township,
Appellee.
Commonwealth Court of Pennsylvania

Argued Oct. 7, 1976.

Decided Nov. 22, 1976.

A dismissed township police officer appealed his dismissal to the Court of Common Pleas, Bucks County, Issac S. Garb, J., which affirmed the dismissal. The dismissed officer again appealed. The Commonwealth Court, No. 802 C.D. 1976, Mencer, J., held that dismissal for conduct allegedly unbecoming an officer, following his conviction for violation of various game laws, would be affirmed.

Order affirmed.

Dismissal of township police officer for conduct allegedly unbecoming officer, following his conviction for violation of various game laws, was affirmed.

Appendix A

Martin J. King, Cordes & King, Newtown, for appellant.

Marcel L. Groen, Groen, Von Rosenstiel, Smolow & Burkett, Cornwells Heights, for appellee.

Before Mencer, Rogers and Blatt, JJ.

MENCER, Judge.

Roger H. Comly (Comly) was a police officer for the Township of Lower Southampton in Bucks County. He was dismissed from that position for conduct allegedly unbecoming an officer. Comly had violated various game laws of the Commonwealth for which he had been convicted, including shooting and possession of a deer out of season and hunting and shooting a deer when his license was suspended for violation of the game laws.

Comly appealed his dismissal from the township police department to the Court of Common Pleas of Bucks County. That court affirmed the dismissal of Comly and this appeal followed. We affirm on the opinion of Judge Garb written for the Court of Common Pleas of Bucks County and reported at 28 Bucks Co. L. Rep. 319 (1976).

ORDER

Now, this 22nd day of November, 1976, the order of the Court of Common Pleas of Bucks County affirming the dismissal of Roger H. Comly is affirmed.

Appendix B

APPENDIX B

OPINION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY

[28 Bucks County Law Reporter 319]

COMLY v. LOWER SOUTHAMPTON TOWNSHIP

Appeal and error—Removal of policemen—Act of July 19, 1965, P.L. 219, §1, 53 P.S. 812—Conduct unbecoming an officer—Violation of Pennsylvania game laws —Scope of review—Held, appeal dismissed.

1. On an appeal by a dismissed police officer to the Court of Common Pleas the Court may take additional testimony and find for itself the facts necessary to a just determination of the controversy and, in order for the Court to justify a dismissal for conduct unbecoming an officer, evidence must be clear and convincing.

2. Conduct unbecoming an officer has been defined as being any conduct which has a tendency to destroy public respect for municipal employes and confidence in the operation of municipal services and violations of the Pennsylvania game laws fit within the purview of that definition.

3. Off-duty conduct when the officer is out of uniform and out of his own police department's jurisdiction may properly be considered in a charge of conduct unbecoming an officer.

C. P. Bucks County, Civil Action—Law, No. 75-12015-05-6. Roger H. Comly v. Lower Southampton Township.

Wayne N. Cordes, of Cordes & King, for appellant.

Marcel L. Groen, of Simons, Kashkashian, Kellis & Green, for appellee.

GARB, J., April 13, 1976.

This is an appeal by the petitioner herein, a police officer for the Township of Lower Southampton, Bucks County, Pennsylvania, from the action of the Board of Supervisors of the said Township dismissing him as a police officer, which appeal is taken under and pursuant to the provision of the Act of June 15, 1951, P.L. 586, §5, 53 P.S. 815. He was removed following a hearing

held before the Board of Township Supervisors on December 5, 1975, the proceedings at said hearing having been transcribed, at the request and suggestion of the Chief of Police of the Township, all of which was done pursuant to the Act of July 19, 1965, P.L. 219, §1, 53 P.S. 812. The reason for the dismissal was conduct unbecoming an officer, one of the reasons set forth for dismissal or removal under the foregoing Act of Assembly. Pursuant to the foregoing appeal from the decision of the Board of Township Supervisors, a hearing was held before the undersigned on March 23, 1976 and following that hearing we hereby affirm the decision of the Board.

On November 19, 1975 the Chief of Police summoned the appellant to his office and at that time advised

the appellant that he was being dismissed from the police department for conduct unbecoming an officer. On November 20, 1975 the Chief gave to the appellant a letter setting forth the applicable provisions of the Act of Assembly under which the dismissal or removal was being made, setting forth therein the revelant provisions of the Acts of Assembly having to do with rights to hearings before the Board of Supervisors, appeal, a statement of the reasons for the dismissal, to wit, conduct unbecoming an officer, and the specification of the appellant's alleged activities giving rise to that conduct. The reasons set forth therein were that appellant had violated various of the game laws of the Commonwealth of Pennsylvania for which he had been convicted, including shooting of a deer and possession of a deer out of season, hunting and shooting a deer when the appellant's license was suspended or revoked in violation of the game laws of the Commonwealth. The letter further contained appended thereto copies of the Game Prosecution Reports setting forth the times, dates and places of the alleged violations of the Pennsylvania game laws.

The Chief likewise furnished a statement of these charges and his decision regarding dismissal to the Board of Township Supervisors and under letter of November 26, 1975[1] the chairman of the Board of Supervisors advised the appellant that the Board had determined upon his dismissal based upon the charges of the Chief by a vote of five to nothing. The foregoing letter further advised the appellant of his right to a hearing before the Board to present evidence with regard to the action of

[1] Although the letter states that the action was taken at an executive session, the evidence reveals that it was a public meeting.

termination. The letter further advised the appellant of his right to appeal to this court should he be unsuccessful in his hearing before the Board. The appellant requested a hearing before the Board which was held as aforesaid.

At the hearing before the Board of Township Supervisors evidence was presented that he had committed two violations of the game laws in December of 1974, the first being his failure or refusal to exhibit the head of a deer which he had slain to a game officer and the second being his failure and refusal to submit his hunting license for inspection by another game officer. Both of these matters resulted in convictions of summary provisions of the game laws before two different and distinct District Justices of the Peace and as a result of those convictions fines were imposed which were paid by the appellant and from those convictions no appeals were taken. Evidence further revealed that as a result of those two convictions the Pennsylvania Game Commission revoked his hunting license for a period of five years or until the year 1980.

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Evidence before the Board of Township Supervisors at the hearing of December 5, 1975 established that in November of 1975 the appellant was charged with and convicted of killing a deer in Buckingham Township, this county, on a Sunday when hunting was prohibited and, obviously, at a time when his hunter's license was under revocation. When apprehended and confronted with these charges the appellant initially denied his culpability but subsequently admitted it and paid the appropriate fines as imposed. The facts of his apprehension and conviction of the foregoing violations of the game laws were fully

and duly established at the hearing and in fact appellant testified and admitted same. He further admitted in his own testimony, voluntarily offered, that he had committed the game law violations of December, 1974 resulting in the revocation of his license.[2] At the hearing before this court on appeal he likewise testified voluntarily and admitted the foregoing violations.

Based upon the foregoing, we are satisfied by clear and convincing evidence that the appellant had in fact violated the game laws of the Commonwealth of Pennsylvania as set forth in a specification of charges given him by the Chief and that, therefore, the action of removal taken by the Board of Supervisors was both justified and warranted.

The Act of 1951 provides for an appeal by a dismissed employee to the Court of Common Pleas but does not set forth the standards or criteria of such appeal nor the scope of review. In *Vega Appeal*, 383 Pa. 44 (1955) it was held that the Court of Common Pleas on such an appeal may take additional testimony and find for itself the facts necessary to a just determination of the controversy. The court must determine the cause as it deems proper and make its own order concerning the discharge or reinstatement of the officer. Under such circumstances, in order for the court to justify a dismissal for conduct unbecoming an officer, evidence to warrant the imposition of such a penalty ought to be clear and convincing. *Vega Appeal, ibid.* Compare *Wilson v. Warminster Township*, 28 Bucks Co. L. Rep. 162 (1976). See also *Masemer v. Bor-*

[2] This evidence was properly admitted to demonstrate the reason for the revocation of appellant's hunting license.

ough of McSherrystown, 34 D. & C. 2d 669 (1964) wherein it was held that a full-time police officer may only be suspended or removed for causes stated in the act, in this case, *inter alia,* conduct unbecoming an officer.

Conduct unbecoming an officer has been defined as being any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. It is not necessary that the alleged conduct be criminal in character nor that it be proved beyond a reasonable doubt. *Zeber Appeal,* 398 Pa. 35 (1959). Clearly, in this case, the conduct of the appellant of which he had been duly convicted by the appropriate authorities under the Pennsylvania game laws and which were found by clear and convincing evidence by both the Board of Township Supervisors and this court to have been committed, would fit within the purview of that definition. The Act of Assembly in 53 P.S. §812 provides the bases upon which an officer may be removed which include, *inter alia,* violation of any law which constitutes a misdemeanor or felony, or conduct unbecoming an officer. Obviously by separating these two types of conduct into separate classes, it cannot be contemplated that conduct unbecoming an officer must rise to the level of being a misdemeanor or felony. In fact, the conduct which formed the basis upon which appellant was ordered

removed by the Board of Township Supervisors constituted summary offenses under the game laws of the Commonwealth. The conduct required in order to justify removal for conduct unbecoming an officer obviously need not rise to the level of conviction or commission of a misdemeanor

or felony as was amply demonstrated by *Eppolito v. Bristol Borough,* 19 Pa. Commonwealth Ct. 99 (1975) affirming this court in sustaining the borough council in disciplining the appellant therein but in modifying the discipline imposed. See *Eppolito v. Bristol Borough,* 26 Bucks Co. L. Rep. 135 (1974).

Appellant complains that he was somehow denied the right to a due process hearing before the Board of Township Supervisors and likewise before this court when both the Board and the court refused to permit evidence that other members of the police department had committed infractions of the penal code for which they had not been disciplined. The Commonwealth Court in *Eppolito v. Bristol Borough, supra,* made short shrift of that argument in that case in the following language:

> "Nor does the fact, alleged by Eppolito that other lost or stolen plates may have been used by members of the department for surveillance activity change the result. The fact that others may have been engaged in actions similar to those of Eppolito (and, incidentally, may also be guilty of conduct unbecoming an officer), does not justify Eppolito's conduct."

Appellant's argument that the conduct for which he was being removed was committed by him at a time when he was off duty, out of uniform, and out of his own police department's jurisdiction is likewise of little moment as once again acknowledged in *Eppolito v. Bristol Borough, supra.* As noted therein:

> "Eppolito's argument that his conduct was personal action, performed out of uniform and off duty,

> is not persuasive. Off duty conduct may properly be considered in a charge of conduct unbecoming an officer."

The comment of Judge Rufe of this court in the Eppolito case as adopted by the Commonwealth Court in its opinion fully and adequately summarizes our observation with regard to appellant's conduct in this case:

> "'. . . the public has every right to expect its police officers to abide by all the rules, regulations and laws that apply to all citizens. If anything, the public has a right to expect a higher standard of conduct from its law enforcement officers, certainly not a less law abiding standard as Eppolito's conduct indicated.'"

The attitude of appellant herein before the Board as reflected in his testimony to the effect that he totally failed to realize and understand this standard of conduct when he violated the game laws of Pennsylvania at a time when he was off duty, out of uniform and in another municipality totally astounds us. It fails to reflect any sensitivity on his part to the conduct expected by the citizenry at large of its public servants, and in particular its police officers, with regard to respect for the law.

We are totally unimpressed with the procedural arguments advanced by the appellant. Although technically perhaps the statement of charges should have been given him by the Board of Supervisors rather than the police chief, the police chief did give him a full and complete written statement of the charges against him together with all of the applicable provisions of the law advising him

of all of his various protections under the Act of Assembly, and we consider that these were adopted by the Board of Supervisors in its letter to him written over the signature of the Chairman of November 26, 1975. He was afforded a hearing before the Board of Township Supervisors within ten days of that letter as mandated by the Act of Assembly and we hold that that hearing was held in such a way as to protect all of his various legal rights. He was present, represented by counsel, was afforded the opportunity of cross-examining the witnesses against him and was given and accepted the right to present evidence and testify on his own behalf. Although some of the evidence technically may have been improperly received as being hearsay, inasmuch as he admitted the factual allegations of that testimony by his own testimony, we fail to perceive any respect in which he was prejudiced or any of his rights violated.

Appellant has challenged the standard of "conduct unbecoming an officer" as being unconstitutional for vagueness under the due process provisions of the United States Constitution. Appellant makes this contention in the face of *Faust v. Police Civil Service Commission of Borough of State College,* Pa. Commonwealth Ct. , 347 A.2d 765 (1975) which he acknowledges and which holds to the contrary but based upon the argument that this case is bad law and should not be followed. Obviously, that is an argument which may not be dignified in this court, it being an opinion by an appellate court of this Commonwealth which is binding on this court.

For the foregoing reasons we are satisfied and do hold that the statement of charges against him was duly

established both before the Board and before this court by clear and convincing evidence and does constitute conduct unbecoming an officer.

ORDER

AND NOW, to wit, this 13th day of April, 1976 it is hereby ordered, directed and decreed that the order of the Board of Township Supervisors of Lower Southampton Township, Bucks County, Pennsylvania is affirmed and this appeal dismissed.

By the Court
(s) Isaac. S. Garb, *J.*

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APPENDIX C

PER CURIAM ORDER OF SUPREME COURT OF PENNSYLVANIA

NO. 2812

ALLOCATUR DOCKET
Filed In
Supreme Court
Dec 6 1976
Eastern
District

2-11-77
Petition denied.
Per Curiam

P.A. 5521
East. Dist.

IN THE SUPREME COURT OF PENNSYLVANIA
No.

ROGER H. COMLY, PETITIONER
vs.
LOWER SOUTHAMPTON TOWNSHIP,
RESPONDENT

PETITION FOR ALLOWANCE
OF APPEAL

Appendix C

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania, 1976 Sessions, at No. 802 C.D., dated November 22, 1976, affirming the Order of the Court of Common Pleas of Bucks County, Civil Division, 1976 Sessions, at No. 12015, dated the 13th day of April, 1976.

Martin J. King, Esq.
Attorney for Appellant
Cordes & King
27 South State Street
Newtown, Bucks County
Pennsylvania, 18940
(215) 968-2248

C-1

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia, 19107
February 14, 1977

Martin J. King, Esq.,
Cordes & King
27 South State Street
Newtown, Bucks County, Pa. 18940

In re: Roger H. Comly, Petitioner v. Lower Southampton Township No. 2812 Allocatur Docket

Appendix C

Dear Mr. King:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"February 11, 1977

Petition Denied
Per Curiam."

An application for Reconsideration of Denial of Allowance of Appeal must be prepared in the same manner as the original petition (see Pa. R.A.P. 1111), must be confined to the grounds and must contain the certification set forth in Pa. R.A.P. 1123(b) (1) and (2), and, in order to be timely, must be received within seven days after the date of mailing of this notice.

No answer to an Application for Reconsideration of Denial of Petition for Allowance of Appeal will be received unless requested by the Supreme Court on its own motion.

Very truly yours,
Sally Mrvos
Prothonotary
by (s) Laura E. Litchard
Laura E. Litchard
Deputy Prothonotary

LEL:mb
CC: Ronald J. Smolow, Esq.

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Appendix D

APPENDIX D

NOTICES OF APPEAL FILED IN COURTS BELOW

Received and noted on docket in Supreme Court 2/24/77.
MB.

IN THE SUPREME COURT OF PENNSYLVANIA

ALLOCATUR DOCKET NO. 2812 1976 SESSIONS

ROGER H. COMLY, APPELLANT

vs.

TOWNSHIP OF LOWER SOUTHAMPTON, APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
REQUEST FOR CERTIFICATION AND TRANSMISSION OF RECORD

Martin J. King, Esquire
Attorney for Appellant
Cordes, King & Hoffmann
27 South State Street
Newtown, Bucks County,
Pennsylvania, 18940
(215) 968-2248

Appendix D

IN THE SUPREME COURT OF PENNSYLVANIA

Allocatur Docket No. 2812 1976 Sessions

ROGER H. COMLY,
Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROGER H. COMLY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final ORDER denying appellant's Petition for allocatur, entered in this action on February 11, 1977, and affirming the ORDER of the Commonwealth Court of Pennsylvania sustaining the appellant's dismissal as a police officer.

This appeal is taken pursuant to 28 U.S.C. §1257, paragraph (2).

Respectfully submitted,
(s) Martin J. King

Martin J. King, Esquire
27 South State Street
Newtown, Pa. 18940
(215) 968-2248
Attorney for Appellant
Attorney I.D. No. 16495

Appendix D

IN THE SUPREME COURT OF PENNSYLVANIA

Allocatur Docket No. 2812 1976 Sessions

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

REQUEST FOR CERTIFICATION AND TRANSMISSION OF THE RECORD

To the Prothonotary of the Supreme Court of Pennsylvania:

The appellant, ROGER H. COMLY, pursuant to Rule 12 of the Supreme Court of the United States, respectfully requests that the record in the above captioned matter be certified and transmitted to the said Court.

Respectfully submitted,

(s) Martin J. King

Martin J. King, Esquire
27 South State Street
Newtown, Pa. 18940
Attorney for Appellant
Attorney I.D. No. 16495
(215) 968-2248

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Appendix D

IN THE SUPREME COURT OF PENNSYLVANIA

Allocatur Docket No. 2812 1976 Sessions

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

PROOF OF SERVICE

Pursuant to Rule 33 of the Supreme Court of the United States, Martin J. King, Esquire, Attorney for Appellant, hereby certifies, as a member of the Bar of the Supreme Court of the United States, that contemporaneously with the filing hereof, he has served copies of the foregoing Notice of Appeal and Request for Certification and Transmission upon all parties required to be served, by first class mail, postage prepaid, deposited in the United States Post Office in Newtown, Pennsylvania, addressed at proper post office addresses as follows:

The Board of Supervisors
Township of Lower Southampton
1500 Desire Avenue
Feasterville, Pa. 19047

Appendix D

Marcel Groen, Esquire
and
Ronald J. Smolow, Esquire
Groen, Von Rosensteil,
Smolow & Burkett
Neshaminy Plaza II—Suite 105
Street Road and Bristol Pike
Cornwells Heights, Pa. 19020

The Honorable Robert P. Kane
Attorney General of Pennsylvania
Harrisburg, Pennsylvania 17100

(s) Martin J. King
Martin J. King, Esquire
Cordes, King & Hoffmann
27 South State Street
Newtown, Pa. 18940

Appendix D

RECEIVED AND FILED
PHILADELPHIA
COMMONWEALTH COURT
OF PENNSYLVANIA
Feb 24 3:02 PM '77
IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

No. 802 C.D. 1976

ROGER H. COMLY, APPELLANT

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES
REQUEST FOR CERTIFICATION AND
TRANSMISSION OF THE RECORD

Martin J. King, Esquire
Attorney for Appellant
Cordes, King & Hoffmann
27 South State Street
Newtown, Bucks County,
Pennsylvania, 18940
(215) 968-2248
Attorney I.D. No. 16495

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 802 C.D. 1976

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROGER H. COMLY, the Appellant above named, hereby appeals to the Supreme Court of the Unit d States from the final ORDER of the Supreme Court of Pennsylvania, entered on February 11, 1977, denying appellant's Petition for allocatur and affirming the ORDER and Opinion of the Commonwealth Court of Pennsylvania, entered on November 22, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257, paragraph (2).

Respectfully submitted,

(s) Martin J. King

Martin J. King, Esquire
27 South State Street
Newtown, Pennsylvania
18940
(215) 968-2248
Attorney for Appellant
Attorney I.D. No. 16495

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 802 C.D. 1976

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

REQUEST FOR CERTIFICATION AND TRANSMISSION OF THE RECORD

To the Prothonotary of the Commonwealth Court of Pennsylvania:

The appellant, ROGER H. COMLY, pursuant to Rule 12 of the Supreme Court of the United States, respectfully requests that the record in the above captioned matter be certified and transmitted to the said Court.

Respectfully submitted,

(s) Martin J. King

Martin J. King, Esquire
27 South State Street
Newtown, Pa. 18940
(215) 968-2248
Attorney for Appellant
Attorney I.D. No. 16495

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 802 C.D. 1976

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

PROOF OF SERVICE

Pursuant to Rule 33 of the Supreme Court of the United States, Martin J. King, Esquire, attorney for Appellant, hereby certifies, as a member of the bar of the Supreme Court of the United States, that contemporaneously with the filing hereof, he has served copies of the foregoing Notice of Appeal and Request for Certification and Transmission upon all parties required to be served, by first class mail, postage prepaid, deposited in the United States Post Office in Newtown, Pennsylvania, addressed at proper post office addresses as follows:

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Township of Lower Southampton
1500 Desire Avenue
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and
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Neshaminy Plaza II—Suite 105
Street Road & Bristol Pike
Cornwells Heights, PA 19020

The Honorable Robert P. Kane
Attorney General of Pennsylvania
Harrisburg, PA 17100

(s) Martin J. King
Martin J. King, Esquire
27 South State Street
Newtown, PA 18940
Attorney for Appellant
Attorney I.D. No. 16495

Appendix D

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. 75-12015-05-6
Attorney I.D. No. 16495

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROGER H. COMLY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final ORDER denying and dismissing appellant's appeal, entered by this court in this action on April 13, 1976, affirmed by the ORDER of the Commonwealth Court of Pennsylvania on November 22, 1976, and affirmed by order of the Supreme Court of Pennsylvania on February 11, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257, paragraph (2).

REQUEST FOR CERTIFICATION AND TRANSMISSION OF THE RECORD

To the Prothonotary of the Court of Common Pleas of Bucks County, Pennsylvania:

Appendix D

The appellant, ROGER H. COMLY, pursuant to Rule 12 of the Supreme Court of the United States, respectfully requests that the record in the above captioned matter be certified and transmitted to the said Court.

Filed: February 24, 1977

Respectfully submitted,
(s) Martin J. King
Martin J. King, Esquire
27 South State Street
Newtown, PA 18940
(215) 968-2248
Attorney for Appellant
Attorney I.D. No. 16495

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IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. 75-12015-05-6
Attorney I.D. No. 16495

ROGER H. COMLY,

Appellant

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,

Appellee

PROOF OF SERVICE

Pursuant to Rule 33 of the Supreme Court of the United States, Martin J. King, Esquire, Attorney for Ap-

pellant, hereby certifies, as a member of the Bar of the Supreme Court of the United States, that contemporaneously with the filing hereof, he has served copies of the foregoing Notice of Appeal and Request for Certification and Transmission upon all parties required to be served, by first class mail, postage prepaid, deposited in the United States Post Office in Newtown, Pennsylvania, addressed at proper post office addresses as follows:

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Marcel Groen, Esquire and
Ronald J. Smolow, Esquire
Groen, Von Rosenstein, Smolow
& Burkett
Neshaminy Plaza II—Suite 105
Street Road and Bristol Pike
Cornwells Heights, PA 19020

The Honorable Robert P. Kane
Attorney General of Pennsylvania
Harrisburg, PA 17100

(s) Martin J. King
Martin J. King, Esquire
Cordes, King & Hoffmann
27 South State Street
Newtown, PA 18940

APPENDIX E

POLICE TENURE ACT, ACT OF JUNE 15, 1951, P.L. 568, §1 et seq.

ARTICLE IX.—REMOVAL OF POLICEMEN IN CERTAIN BOROUGHS AND TOWNSHIPS

Cross References

Public officers, see 65 P.S. §1 et seq.

§811. Application of law

This act [1] shall apply to each township of the second class, to each borough and township of the first class having a police force of less than three members and not subject to sections one thousand one hundred sixty-five through one thousand one hundred ninety of the act, approved the fourth day of May, one thousand nine hundred twenty-seven (Pamphlet Laws 519), known as "The Borough Code" [2] and their amendments, nor to sections six hundred twenty-five through six hundred fifty of the act, approved the twenty-fourth day of June, one thousand nine hundred thirty-one (Pamphlet Laws 1206), known as "The First Class Township Code", [3] and their amendments.

[1] Sections 811 to 815 of this title.
[2] Sections 46165 to 46190 of this title.
[3] Sections 55625 to 56650 of this title.

1951, June 15, P.L. 586, §1.

§812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act [1] with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case [2] the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

1951, June 15, P.L. 586, §2; 1961, June 14, P.L. 348, §1; 1965, July 19, P.L. 219, §1.

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§813. Reduction in number of police

If, for reasons of economy or other reasons, it shall be deemed necessary by any township of the second class,

[1] Sections 811 to 815 of this title.

[2] Enrolled bill reads "eases".

or any borough or township of the first class within the scope of this act, [1] to reduce the number of paid employes of the police department, then such political subdivision shall apply the following procedure: (a) If there are any employes eligible for retirement under the terms of any retirement or pension law, then such reduction in numbers shall be made by retirement, if the party to be retired is sixty-five years of age or over; (b) If the number of paid employes in the police force eligible to retirement is sufficient to effect the necessary reduction in number, or if there are no persons eligible for retirement, or if no retirement or pension fund exists, then the reduction shall be effected by furloughing the man or men, including probationers, last appointed to said police force. Such removal shall be accomplished by furloughing in numerical order, commencing with the man last appointed, until such reduction shall have been accomplished. In the event the said police force shall again be increased, the employes furloughed shall be reinstated in the order of their seniority in the service.

1951, June 15, P.L. 586, §3.

§814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed

[1] Sections 811 to 815 of this title

within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person or by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

1951, June 15, P.L. 586, §4.

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§815. Appeal

The suspended or dismissed employe shall have the right to appeal to the court of common pleas of the county in which he was employed.

1951, June 15, P.L. 586, §5.

§816. Department and appointments without proper enactments

In any case in which a township or borough to which this act applies has heretofore appointed policemen or

established a police department by lawful action of council or supervisors but not by or pursuant to an ordinance or resolution regularly enacted, such action shall be deemed to have been a valid exercise of the legislative power of the township or borough for all purposes the same as though an ordinance or resolution had been enacted, and all policemen appointed thereunder shall occupy the same status as in the case of policemen appointed under authority of an ordinance or resolution.

1951, June 15, P.L. 586, §6, added 1961, April 28, P.L. 122, §1.

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